

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

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In The Matter Of )  
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Amendment of Part 95 of the Commission's )  
Rules to Provide Regulatory Flexibility in the )  
218-219 MHz Service )  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

WT Docket No. 98-169  
RM-8951

To The Commission:

COMMENTS OF THE 218-219 MHz LICENSEES

218-219 MHz LICENSEES

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Dated: October 30, 1998

No. of Copies rec'd 074  
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## TABLE OF CONTENTS

	<u>Page</u>
Summary .....	i
Introduction .....	1
I. 218 219-MHz Service Licensees Should Have the Flexibility To Provide Common Carrier or Private Carrier Services. ....	2
II. The License Term and Installment Payment Period for 218-219 MHz Service Licensees Should be Extended to Ten Years. ....	3
A. Extension of the License Term to Ten Years Comports with the Commission's Goal to Attract Small Businesses to the Provision of Spectrum-Based Services and Facilitates Competition. ....	3
B. A Ten-Year License Term is Consistent with the Terms of Other Auctionable Services. ....	5
C. Installment Payment Debt Must be Reamortized in Conjunction with the Extension of the License Term. ....	6
D. The Commission Should Grant All Properly Filed Grace Period Requests and Modify the Amnesty Option to Refund 10% of 218-219 MHz Service Licensees' Bids. ....	7
III. Three- and Five-Year Construction Benchmarks Should be Replaced with the "Substantial Service" Construction Requirement Applicable to Other Wireless Services. ....	11
IV. Current License Transfer Restrictions are Based on Outdated Anti-Trafficking Concerns and Should be Removed. ....	12
V. The Commission Should Permit Aggregation of 218-219 MHz Licenses and Exclude 218-219 MHz from the CMRS Spectrum Cap. ....	13
VI. The Commission Should Allow Partitioning in the 218-219 MHz Service. ....	14

<b>VII. The Commission Should Amend its Current Technical Standards to Provide More Flexibility. ....</b>	<b>15</b>
<b>A. The Automatic Power Control Capability Restrictions Should be Eliminated. ....</b>	<b>15</b>
<b>B. The Antenna Height and Transmitter Power Limitations Should be Eliminated. ....</b>	<b>16</b>
<b>C. The Duty Cycle Limitations Should be Repealed. ....</b>	<b>18</b>
<b>VIII. Conclusion .....</b>	<b>19</b>

## Summary

To promote the goals of regulatory parity and to enhance competition among wireless services, the Commission must amend its rules so that 218-219 MHz service licensees have the same technical and financial flexibility as other wireless licensees. The Commission's proposals in this proceeding, including allowing for the provision of common carrier services, extending the 218-219 MHz license term, reamortizing license debt, and relaxing technical rules, generally promote these goals, and should be adopted, with the modifications proposed herein.

Consistent with the PCS rules, the Commission must reamortize 218-219 MHz service installment payment debt and modify its amnesty option to refund the second ten percent (10%) downpayment made by licensees. In addition, Licensees should only be required to make interest-only payments for the first five years of the license term. Absent a longer period of interest-only financing, licensees would be forced to choose amnesty to avoid a balloon payment shortly after the technical rules for the 218-219 MHz service are finalized. Licensees who choose amnesty should only be required to forfeit ten percent (10%) of their auction bid price, consistent with the PCS licensees who chose amnesty.

Relaxation of the 218-219 MHz technical rules is critical to the success of the service. The automatic power control capability restrictions, the antenna height/power limitations, and the duty cycle limitations act are duplicative of the existing interference protection rule. These technical standards are excessive, outdated, and have resulted only in unnecessary technical restraints that have impeded development and operation of 218-219 MHz systems.

This rulemaking proceeding presents the Commission with the opportunity to put 218-219 MHz service licensees on a level playing field with other wireless services. With the right rules in place, the Commission can ensure regulatory parity and promote competition among wireless services. Since most 218-219 MHz licensees are small businesses, the modifications discussed herein will help the FCC fulfill the goals of Sections 309(j) and 257 of the Act. Most important, however, is to provide 218-219 MHz service licensees with the flexibility needed to establish the 218-219 MHz industry so that service to the public can be realized.

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To The Commission:

**COMMENTS OF THE 218-219 MHz LICENSEES**

In September, 1996, the 218-219 MHz Licensees<sup>1</sup> first petitioned the Commission to amend Part 95 of the Commission's rules to provide regulatory relief from certain licensing, operational and technical limitations which, they believe, have handicapped significantly the development of applications, services and equipment for the 218-219 MHz spectrum band.<sup>2</sup> In its Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking ("NPRM")<sup>3</sup>

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<sup>1</sup> These comments are filed on behalf of Faycomm, Inc. (formerly Euphemia Banas), Loli, Inc., Bay Interactive Ventures, Inc., Southeast Equities, Inc., A.B.R. Communications, Inc., Hago Company, Inc., M&B XXXIX, Inc., Trans Pacific Interactive, Inc., Dunbar Television, Inc., and Star Interactive Video, Inc. (the "218-219 MHz Licensees").

<sup>2</sup> The Petition for Rulemaking ("Petition"), filed on September 4, 1996, requested that the Commission: (a) extend the license term and the installment payment period from five (5) to ten (10) years. The Letter Amendment to Petition for Rulemaking filed on January 28, 1997 ("1st Amendment") requested that the Commission repeal the rule sections relating to duty cycle limitations, height/power ratios, construction benchmarks, and ownership restrictions. The Second Letter Amendment to Petition for Rulemaking filed on February 26, 1997 ("2nd Amendment") requested that the Commission also consider: (a) the prohibition of RTU to RTU transmissions; (b) the prospect for providing licensees with additional spectrum; and (c) the clarification of various engineering and buildout issues. Finally, the Third Letter Amendment to IVDS Petition for Rulemaking filed on March 13, 1998 ("3rd Amendment") requested that the Commission issue a limited waiver of the late fee and automatic default rule.

<sup>3</sup> Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service; Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services, Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking, (FCC 98-228, WT Docket No. 98-169, 13 FCC Rcd \_\_\_, rel. September 17, 1998) ("NPRM").

released on September 17, 1998, the Commission is undertaking an examination of the Commission's rules governing the licensing and use of the frequencies in the 218-219 MHz band. The 218-219 MHz Licensees welcome the opportunity to provide their comments to the Commission.

**I. 218-219 MHz Service Licensees Should Have the Flexibility To Provide Common Carrier or Private Carrier Services.**

The 218-219 MHz Licensees support the Commission's proposal to redesignate the 218-219 MHz service, from a strictly private radio service, to a service that can be used for both common carrier and private operations. Such a redesignation will permit licensees to provide a wider variety of services to the public. Redesignation is consistent with the Commission's previous conclusion that flexibility is preferred to government fiat in the form of rigid regulatory categories. Such flexibility comports with the Commission's statutory authority and serves the public interest.<sup>4</sup> The 218-219 MHz Licensees also agree that the redesignation would eliminate any ambiguity as to whether one-way communication constitutes a permissible use in the 218-219 MHz service.

By granting 218-219 MHz service licensees flexibility to offer multiple services, the Commission would ensure regulatory parity among wireless licensees. The Commission has permitted other licensees, including LMDS<sup>5</sup> and Broadband PCS<sup>6</sup> licensees, to provide both

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<sup>4</sup> *NPRM* at 21.

<sup>5</sup> Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Service Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules; Suite 12 Group Petition for Pioneer Preference, Second Report & Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 (1997).

<sup>6</sup> Second Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Second Report*, 12 FCC Rcd 11267 (1997).

private and common carrier services. The 218-219 MHz Licensees agree with the Commission that the flexibility granted by such redesignation will prove to be beneficial as licensees continue their efforts to make productive use of their licenses and thereby better serve the public interest.

In addition, the Commission should permit 218-219 MHz licensees to change its regulatory status without seeking prior Commission approval. This approach would be consistent with the Commission's rules for MMDS licensees,<sup>7</sup> which allow licensees to choose common or private carrier status, provided that they give sufficient prior notice to customers and to the Commission. Such action would enhance wireless competition by permitting licensees to tailor their services to evolving market conditions and opportunities without substantial regulatory barriers.

**II. The License Term and Installment Payment Period for 218-219 MHz Service Licenses Should Be Extended to Ten Years.**

**A. Extension of the License Term to Ten Years Comports with the Commission's Goal to Promote Small Business Participation in the Provision of Spectrum-Based Services and Facilitates Competition.**

The NPRM proposes to amend Section 95.81(d) of the Commission's Rules to extend the term of all licenses in the 218-219 MHz service from five (5) to ten (10) years from the date of license grant. The 218-219 MHz Licensees strongly support the Commission's proposal. The license term extension will substantially alleviate the burdens for small businesses associated with developing a new business, under new rules, with only one year remaining on their original five-year license term.

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<sup>7</sup> Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, Report and Order, (FCC 98-231, MM Docket No. 97-217, 13 FCC Rcd \_\_\_, released September 25, 1998).

The 218-219 MHz service licensing process has had a troubled history. As one of the first FCC auctions, the oral outcry method was employed resulting in a "fevered" pitch and overbidding by some unsophisticated buyers, which ran-up prices for all. This led to many defaults and high acquisition costs for those who remained. In addition, the FCC failed to reauction the defaulted MSA licenses in a timely manner and have still never licensed the RSAs. The resulting patchwork of licensed areas has contributed substantially to the increased cost of developing equipment and applications as many potential joint venturers (e.g., utility companies, monitoring services, and cable companies) require large regional "footprints" in order to agree to joint venture with new spectrum owners. Such joint ventures would have accelerated the development schedule by leveraging existing research and development as well as existing infrastructure.

A ten-year license term will also help to overcome the rocky regulatory start by ensuring that licensees can attract the necessary capital. Licensees need a license term longer than five years to develop practical, financeable business plans in light of the increasing competition and the lengthy delays in 218-219 MHz technology development. By extending the license period to ten years, the Commission will allow the 218-219 MHz service licensees to demonstrate to financial backers that an investment in the 218-219 MHz service will have sufficient time to develop into a prudent and profitable endeavor.

The Commission is obligated to promote small business participation in the wireless services.<sup>8</sup> A large number of 218-219 MHz service licensees are minority- and women-owned

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<sup>8</sup> For each class of licenses or permits the Commission grants through the use of a competitive bidding system, the Commission shall... promote "economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration and disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,..." 47 U.S.C. § 309(j)(3)(B).

small businesses.<sup>9</sup> The Commission is also required to reduce barriers to entry.<sup>10</sup> Extension of the 218-219 MHz license term will make this spectrum more viable and will, thereby, promote these goals, as well as enhance competition by increasing the number of wireless service providers in the market. Extension of 218-219 MHz license term will, therefore, advance the public interest.

**B. A Ten-Year License Term is Consistent with the Terms of Other Auctionable Services.**

The FCC originally adopted a five-year license term for the 218-219 MHz service in order to deter trafficking in licenses that had been granted by lottery. However, the need to deter the trafficking and unjust enrichment that accompanied lotteries was eliminated when the Commission decided to award 218-219 MHz service licenses by auction.<sup>11</sup> Moreover, the Commission has designated ten-year license terms for virtually every other non-broadcast auctionable service, including Local Multipoint Distribution Service (LMDS), Personal Communication Services (PCS), General Wireless Communications Services (GWCS), Wireless Communication Services (WCS), 220 MHz Services and Specialized Mobile Radio services (SMR).<sup>12</sup> Ten-year license terms for the 218-219 MHz service will promote regulatory parity and enhance competition among wireless service providers.

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<sup>9</sup> 557 of the 594 licenses won in the original IVDS auction are owned by either minority-owned or small businesses. See, The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 FCC Red. 17087 (1997).

<sup>10</sup> The Commission is responsible for identifying and eliminating "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services." 47 U.S.C. § 257.

<sup>11</sup> Even for the 9 MSAs that were awarded by lottery, the compelling public interest reasons noted above overshadow the original anti-trafficking concerns.

<sup>12</sup> See, 47 C.F.R. §§ 101.69, 24.15, 26.13, 27.13 and 90.149.

**C. Installment Payment Debt Must be Reamortized in Conjunction with the Extension of the License Term.**

The 218-219 MHz Licensees agree with the Commission that the reamortization of installment payment terms is necessary in light of the proposed extended license term. The 218-219 MHz Licensees' Petition sought reamortization of the 218-219 MHz service license debt over a ten-year license term, with interest-only payments for the first five years. The 218-219 MHz Licensees continue to believe that interest-only financing for five years, rather than two years, is the only way 218-219 MHz service licensees will have sufficient time and available resources to build their business and pay its obligation to the FCC.

The Commission granted the 218-219 MHz licenses in January and February, 1995.<sup>13</sup> Under the Commission's proposed reamortization, installment payment debt will be amortized over ten years from the date of grant. However, 218-219 MHz service licensees will also be required to bring the balance current under the ten-year reamortization schedule within 90 days of an initial decision in the proceeding. Thus, if the Commission adopted an order by the end of this year, 218-219 MHz service licensees would have to pay two years worth of principal payments, as well as the accrued interest, in a lump sum, within 90 days, in order to retain their licenses.<sup>14</sup> The Commission has previously found that a lump sum payment "could place a significant burden on licensees."<sup>15</sup> Furthermore, the 218-219 MHz

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<sup>13</sup> See, Interactive Video and Data Service (IVDS) Applications to be Granted January 18, 1995, Public Notice (rel. December 29, 1994). See also Interactive Video and Data Service (IVDS) Applications to be Granted February 28, 1995, Public Notice, 10 FCC Rcd. 3388 (1995).

<sup>14</sup> For example, a licensee that bid \$100,000 in the auction, and made its 20% payment, carries \$80,000 in installment payment debt. If the Commission concluded this proceeding on December 31, 1998, payments would be due by March 31, 1999. Under a five year interest-only amortization plan, the licensee would owe \$23,800. Under the Commission's plan, the same licensee would owe \$35,950.

<sup>15</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16436, 16450 (1997) ("PCS Second Report & Order").

service has suffered from delays in technology and regulatory uncertainty. Most 218-219 MHz licensees will be unlikely to be able to afford to submit several years' worth of principal and interest payments just ninety (90) days after the Commission finalizes the technical rules in this service. Indeed, a 218-219 MHz licensee cannot even complete its business plan until it is clear whether any or all of the technical restrictions under consideration in the NPRM will be changed. In order to have any realistic chance to plan for and build a business following the FCC's order in this matter, the payment obligations must be ramped-up slowly, while at the same time ensuring that the U.S. Government receives the full value of the bid amount during the term of the license. Accordingly, unless the interest-only period is extended to at least five years from the license date, the Commission's proposed installment payment "solution" will really not allow 218-219 MHz licensees to seriously consider retaining their licenses and building their systems.

**D. The Commission Should Grant All Properly Filed Grace Period Requests and Modify the Amnesty Option to Refund 10% of 218-219 MHz Service Licensees' Bids.**

The 218-219 MHz Licensees support the Commission's proposal to grant all properly filed grace period requests as of the effective date of reamortization. Such action is appropriate since the licensees have expended time and expense to remain in compliance with the Commission's rules, and have relied on the Commission's statements that it would revise the 218-219 MHz service rules.

Through the NPRM, the Commission proposes to reamortize every non-defaulting licensee's installment payment obligations and credit, under the revised schedule, all payments already received, with any additional funds held in reserve for application against future

payments.<sup>16</sup> Acknowledging that its proposal may trigger the payment of back-due amounts earlier than expected for some licensees, the Commission has proposed to offer licensees two financing options: (i) Licensees may continue making installment payments, consisting of all accrued interest and principal due and owing as of that date; or (ii) Licensees may choose the "amnesty" option, surrendering any licenses they choose to return to the Commission for reauction and have all outstanding debt on those licenses forgiven.

The 218-219 MHz Licensees generally support the Commission's options, but propose certain modifications. The Commission's plan to refund installment payments for licensees that opt for amnesty on all licenses places C-Block PCS and the 218-219 MHz service in a substantially similar regulatory environment. Indeed, the NPRM emphasizes that the "amnesty" option is intended to be "much like that offered to broadband PCS C-Block licensees."<sup>17</sup> However, the C-Block PCS licensees only made a ten percent (10%) down payment on their licenses<sup>18</sup>, whereas 218-219 MHz service licensees submitted a twenty percent (20%) down payment.<sup>19</sup> The 218-219 MHz Licensees urge the Commission be consistent and apply regulatory parity by refunding the second 10% payment to the 218-219 MHz service licensees that choose amnesty. The Commission has previously stated that "retention of downpayments – 10% of the bid price for most businesses – is consistent with our previous decisions and actions affecting C-Block bidders..."<sup>20</sup> The Commission's reasons

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<sup>16</sup> NPRM at 23.

<sup>17</sup> NPRM at 23, ¶ 39.

<sup>18</sup> Auction Notice and Filing Requirements for 493 BTA Licenses Located on the C Block for Personal Communication Services in the 2 GHz Band, Public Notice (rel. May 11, 1995).

<sup>19</sup> Private Radio Bureau Information Notice and Filing Requirements for the First Auction of Interactive Video and Data Services Licenses, Public Notice (rel. May 23, 1994).

<sup>20</sup> PCS Second Report and Order, ¶ 55.

for refusing to refund the down payment for PCS licensees – that it would undermine the auction process by making the bidder whole again – would not be applicable to the 218-219 MHz Licensees. The 218-219 MHz service licensees who elect to return their licenses under the amnesty option will still forfeit 10% of their payments, consistent with the Commission's PCS precedent. The principles of regulatory parity, and fairness, require that the 218-219 MHz licensees not be required to pay a heavier penalty than the PCS C-Block licensees.

The Commission's amnesty "crediting" proposal also suffers from the same inequitable starting place (e.g., 20% downpayments vs. 10% downpayments). Indeed, the Commission proposes that, for each license returned under the amnesty option, the licensee would choose either to (i) receive no credit for its down payment but remain eligible to bid on the surrendered license in the reauction; or (ii) obtain credit for 70 percent of its down payment and forego for a period of two years from the start date of the reauction eligibility to reacquire the license surrendered either through reauction or another secondary market transaction. Under either option, the Commission proposes to apply all installment payments made on surrendered licenses, plus the 70 percent credit under the second option, to previously accrued interest for retained markets, with any excess installment payments refunded.

In effect, this proposal requires licensees to forfeit 30 percent of their deposits if they elect this "prepayment" option, even though this money has already been paid and would be used to purchase licenses at the original auction price. In the context of the debate over establishing options for penalties associated with broadband PCS licensees, it was noted that the 30% penalty is more than 50 times higher than any previous penalty in FCC history.<sup>21</sup>

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<sup>21</sup> *PCS Second Report & Order, Dissent by Chairman Reed Hundt.*

The prepayment proposal, it was argued, violated "basic principles of commercial reasonableness" and "ignores the time value of money and inflates the effective price paid by the licensees that it purportedly seeks to assist."<sup>22</sup> The Commission adopted the proposal, however, because 30% of the PCS licensees' 10% down payment was the equivalent of the "3% of net bid" penalty for applicants that defaulted on down payments, and consistent with Commission case law.<sup>23</sup>

For 218-219 MHz service licensees, the proposed penalty is unduly harsh, because, as noted above, the 218-219 MHz service licensees paid 20% of their bids as a down payment, rather than the 10% paid by PCS licensees. Thus, the 70% prepayment credit (or 30% penalty) for 218-219 MHz licensees is not equal to 3% of the net high bids, as it was for PCS but rather is equal to 6% of the net high bid. The remedy for this inequity is to refund the second 10% downpayment made by 218-219 MHz service licensees and then apply the 70% credit for the balance. With that accomplished, the 70% credit would be consistent with C-Block PCS and with the Commission's Part 1 default rules.<sup>24</sup>

The 218-219 MHz Licensees also request that the Commission clearly state that all installment payments submitted for licenses returned under the amnesty option will be

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<sup>22</sup> *Id.*, Chairman Hundt explained that "the value of a bid paid out over ten years is significantly less -- around 40% less -- than that same bid paid in cash. The consequence of this oversight is a massive penalty for any licensee that might otherwise elect this alternative."

<sup>23</sup> See BDPCS, Inc., *Order*, 12 FCC Rcd 14399 (1996) (assessing a \$67,695,653.23 default payment for failure to submit the required down payment for licenses won in the C block auction), *reconsideration denied*, 12 FCC Rcd 6606 (1997), and C.H. PCS, Inc., *Order*, 11 FCC Rcd 22430 (1996) (assessing a \$5,031,232.50 default payment for failure to submit the required down payment for one license won in the C block reauction).

<sup>24</sup> 47 C.F.R. §1.2104(g)(2) (providing that if a high bidder defaults after the close of an auction, such bidder is subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission, plus an additional payment equal to 3 percent of the subsequent winning bid.)

refunded<sup>25</sup> and that the Commission will forgive payment of any previously due, but unpaid, installment payment. Similar statements from the Commission in the C-Block PCS context made the election process simpler for licensees.

### **III. Three- and Five-Year Construction Benchmarks Should be Replaced with the "Substantial Service" Construction Requirement Applicable to Other Wireless Services.**

The 218-219 MHz Licensees support the Commission's proposal that construction requirements for the 218-219 MHz service be made consistent with those imposed on other wireless services. As noted in their Petition, the 218-219 MHz Licensees believe the current construction benchmarks are unnecessary, and can force licensees to spend money imprudently on construction, solely to meet administrative deadlines with no measurable public service benefit. In the past, the scarcity of commercially viable 218-219 MHz service equipment has resulted in futile efforts of licensees to meet the strict construction benchmarks. The Commission acknowledged this fact when it waived the one-year construction "buildout" requirement for lottery licensees. The Commission concluded that "eliminating the one-year construction requirement will provide licensees with greater flexibility in selecting service options, obtaining financing, selecting equipment and other considerations related to the construction of their Systems." Later, the Commission waived the three-year benchmark and said, "Requiring IVDS [218-219 MHz ] licensees to comply with rules which are under Commission review would not further the public interest."<sup>26</sup>

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<sup>25</sup> See, *PCS Second Report and Order*, at ¶ 58.

<sup>26</sup> Amendment of Part 95 of the Commission's Rules to Modify Construction Requirements for IVDS Licenses, *Report and Order*, 11 FCC Rcd 2472, 2473 (1996). More recently, the Commission waived the three-year construction benchmark date for all licenses because "it would have been unreasonable and contrary to the public interest to enforce the benchmark while relevant Commission policy was subject to review in this rulemaking proceeding." Requests by Interactive Video and Data Service Auction Winners to Waive the January

The 218-219 MHz Licensees support the Commission's proposal for more flexible construction requirements, as well as the regulatory parity that the proposal extends to 218-219 MHz service licensees. The 218-219 MHz Licensees also support the five-year date being calculated from the date of the Order in the instant rulemaking proceeding. As the Commission is well aware, from the outset the 218-219 MHz service has suffered from lack of commercially available technology and equipment. Although some equipment is now being tested, and shows promise, it is impractical to expect that the 218-219 MHz service licensees can meet a five-year construction benchmark based on their initial license grant dates and thus, the 218-219 MHz Licensees endorse this proposal.

#### **IV. Current License Transfer Restrictions are Based on Outdated Anti-Trafficking Concerns and Should be Removed.**

Currently, 218-219 MHz service Licensees may not transfer, assign, or sell licenses acquired by lottery until the five-year construction benchmark has been met. The 218-219 MHz Licensees support elimination of the transferability restriction. The rule currently applies only to those licenses which were won in the September 1993 lottery.<sup>27</sup> In order to ensure parity among all 218-219 MHz service licensees, the transferability restriction which applies to the 18 lottery-won licenses should be eliminated. Since 1994, the Commission has licensed numerous other services, and permitted licensees to partition and disaggregate at will.<sup>28</sup> Thus, the concerns that prompted the Commission to adopt anti-trafficking

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18, 1998 and February 28, 1998, Construction Deadlines, Order, 13 FCC Rcd 756 (1998).

<sup>27</sup> The Commission has amended its license transferability restriction to exclude licenses acquired through auction. See, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fourth Report and Order, 9 FCC Rcd 2330 at 2335, 2343 (1994).

<sup>28</sup> See, 47 C.F.R. §§ 24.714, 101.111, 90.813, and 90.1019 (1997) (allowing partitioning and disaggregation by PCS, LMDS, SMR and 220 MHz licensees, respectively).

restrictions are no longer relevant because potential market entrants may obtain 500 KHz or 1 MHz of spectrum from a variety of wireless service providers, rather than a 218-219 MHz service licensee. Further, the Commission has now eliminated restrictions on transferability of unbuilt facilities even in such services as broadcasting, where for decades such transfers had been prohibited.<sup>29</sup> Moreover, the public interest associated with having all 218-219 MHz service licensees operating commercially on the same regulatory basis outweighs any antitrafficking concerns which formed the basis for the Commission's original construction benchmark rule.

**V. The Commission Should Permit Aggregation of 218-219 MHz Service Licenses and Exclude 218-219 MHz from the CMRS Spectrum Cap.**

The Commission should not include 218-219 MHz spectrum in the CMRS spectrum cap. The Commission declined to include common carrier paging, GWCS or WCS in the CMRS spectrum cap because it found it "unlikely that any one licensee could accumulate sufficient spectrum to dominate the paging market, much less the CMRS market as a whole" and because the Commission believed that a cap could arbitrarily limit a carrier's capacity to provide services that may require multiple channels.<sup>30</sup> The fact that the subject service is only one megahertz of spectrum (and where each licensee has only 500 KHz) dictates that control of this spectrum would not be sufficient to exert market power even assuming grant of the Commission's proposal to allow the two 500 KHz licenses to be owned by a common entity.

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<sup>29</sup> 1998 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules, and Processes, Report and Order, 13 FCC Rcd 11349 (1998).

<sup>30</sup> In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 2732 (1997).

In addition, the changing wireless environment may cause the spectrum caps to burden unduly wireless licensees and hinder innovation and development without any corresponding regulatory benefit.<sup>31</sup> The Cellular Telephone Industry Association (CTIA) has recently petitioned the Commission to forbear from enforcing the CMRS spectrum cap as a means to allow carriers to provide services "more efficiently in response to consumer demand; ensure the continued deployment of advanced technologies and innovative services; and allow carriers to position themselves more readily as local service competitors."<sup>32</sup> Given the small amount of spectrum in the 218-219 MHz service, 218-219 MHz service should be able to benefit from the expanded flexibility offered to other wireless licensees.

#### **VI. The Commission Should Allow Partitioning in the 218-219 MHz Service.**

The 218-219 MHz Licensees agree with the Commission that allowing partitioning in the 218-219 MHz service will provide the same benefits as in other services, namely (i) removing potential barriers to entry, thereby increasing competition; (ii) encouraging parties to use spectrum more efficiently; and (iii) providing speedy service to unserved and underserved areas.<sup>33</sup> However, disaggregation is not practical for licenses that are only 500 KHz. In fact, 218-219 MHz service licensees suffer from the opposite problem: too little spectrum. With guardband protection, the spectrum available to provide service to consumers is reduced even further. Thus, the 218-219 MHz Licensees support the Commission's

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<sup>31</sup> Jeffrey Silva, "Changing Times May Force FCC to Relax Spectrum Cap," RCR, October 5, 1998, p. 5.

<sup>32</sup> *Petition for Forbearance of the Cellular Telecommunications Industry Association* (filed September 30, 1998), at 4. See also, Third Annual Commercial Mobile Radio Service (CMRS) Competition Report, (FCC 98-91, 13 FCC Rcd \_\_\_, rel. June 11, 1998), at Separate Statement by William Kennard ("I believe we should work with Congress to eliminate regulatory obstacles to the development of fixed, as well as mobile, wireless communication services.")

<sup>33</sup> Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21831 (1996).

proposal to allow partitioning on the same terms as other wireless licensees, but believes disaggregation is impractical for such a small amount of spectrum.

**VII. The Commission Should Amend its Current Technical Standards to Provide More Flexibility.**

**A. The Automatic Power Control Capability Restrictions Should be Eliminated.**

The Commission should eliminate the automatic power control restrictions in the 218-219 MHz service because the restrictions increase the cost of developing equipment without providing commensurate value to the public. The Commission previously waived the restriction, in part, because "incorporating automatic power controls will increase the complexity and cost of . . . equipment."<sup>34</sup> The Commission also recognized that the services envisioned for the 218-219 MHz service now "are very different from those anticipated to be provided" on the spectrum.<sup>35</sup> Furthermore, the equipment will not necessarily be in the same proximity to television receivers as it was when the IVDS rules for first promulgated, and it was expected that IVDS spectrum would be used for "set-top box"-type services.<sup>36</sup> Therefore, the 218-219 MHz Licensees request that the automatic power control requirements be deleted from the rules. In the alternative, the Licensees request that such automatic power controls be applied only when CTSs and/or RTUs will work in conjunction with television sets, where interference is, at least theoretically, more possible.

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<sup>34</sup> Phoenix Data Communications, Inc. Request for Waiver of Section 95.855 of the Commission's Rules, Order, DA 98-972, 13 FCC Rcd \_\_\_\_ (released May 21, 1998).

<sup>35</sup> Id., at 3, ¶ 6.

<sup>36</sup> Id., The Commission said that applications unlike set top boxes are less likely to cause interference, and granted the waiver to the automatic power control rule, in part, based on that reason.

**B. The Antenna Height and Transmitter Power Limitations Should be Eliminated.**

The Commission's current height and power limitations in the 218-219 MHz service are unnecessary and hinder the design, development, and operation of 218-219 MHz systems. These limitations are not necessary because broadcasters have the ultimate interference protection of Section 95.861(e), which mandates that 218-219 MHz service licensee must investigate and eliminate interference to television broadcasting and reception within 30 days of notification of the interference. If the 218-219 MHz service licensees fail to eliminate the interference within the 30-day period, the CTS or RTU causing the interference must discontinue operation.<sup>37</sup> This protection effectively balances the need for Channel 13 broadcasters to be protected from interference with the need for 218-219 MHz service operators to expedite the design and delivery of an effective and economical service to the public.

The Commission recently accepted comments on a waiver request to allow Dispatch Interactive Television ("DITV"), a 218-219 MHz licensee, to operate at up to 250 watts ERP.<sup>38</sup> DITV's waiver request submitted technical data to support its assertion that collocation with a television Channel 13 licensee ensures that the power disparity between the television and 218-219 MHz signal would be constant and therefore eliminate potential interference concerns.<sup>39</sup> Further, "collocation" was defined in the broadcast context (i.e., § 73.535 of the

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<sup>37</sup> 47 C.F.R. § 95.861(e).

<sup>38</sup> Dispatch Interactive Television Request for Declaratory Ruling and Waiver of the Sections 95.855 and 95.859(a) of the Commission's Rules, *Public Notice*, DA 98-1705 (released August 25, 1998).

<sup>39</sup> See, Amendment to Request for Waiver and Declaratory Ruling of Dispatch Interactive Television, Inc., filed June 9, 1998 at 4. See, copy attached hereto as Exhibit A.

Commission's Rules) as any location within a quarter of a mile of the television transmitter.<sup>40</sup>

The 218-219 MHz licensees urge that the Commission permit 218-219 MHz licensees to operate at up to 250 watts ERP as long as the power of the 218-219 MHz signal remains substantially lower than the Channel 13 signal. Alternatively, and at a minimum, the 218-219 MHz licensees urge the Commission to adopt a standard "collocation exemption" for 218-219 MHz licensees operating within a quarter of a mile of a television Channel 13 broadcaster, much like the technical standards of Section 73.535 of the Commission's rules.<sup>41</sup>

The Commission noted that the television Channel 13 interference issue is likely to become moot when television converts to digital broadcasting ("DTV"). Under the Commission's DTV conversion, broadcasters will broadcast both a digital and analog station until the year 2006. Accordingly, the overall potential for analog Channel 13 interference will be reduced as consumers convert to digital, which will be broadcast on an entirely different television channel. In the interim, until analog broadcasting is completely phased out, television licensees should not obtain more interference protection from the 218-219 MHz service than from other licensees on surrounding 200 MHz frequency bands. Specifically, no similar height-power restrictions have been imposed on the Automated Maritime Telecommunications Systems (AMTS), which operates in the 216-218 MHz band, or the 220-222 MHz service, which provides specialized mobile radio service near the Channel 13 spectrum allotment (210-216 MHz). Indeed, the AMTS service is even closer to Channel 13 than is the 218-219 MHz service. The Commission itself notes that very few, if any, interference complaints have been received alleging interference by other licensees in this area

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<sup>40</sup> Id., Engineering Statement at 1.

<sup>41</sup> 47 C.F.R. §73.535, Id. at 1-2.

of the spectrum. Moreover, even if interference occurred, television licensees may use the Section 95.861(e) process to remedy interference.

### C. The Duty Cycle Limitations Should be Repealed.

Section 95.863(a) of the Commission's rules requires that "the maximum duty cycle of each RTU shall not exceed 5-second per hour, or, alternatively, not exceed one percent (1%) within any 100 millisecond interval."<sup>42</sup> The Commission, in response to requests by the 218-219 MHz Licensees and others seeking relief from the duty cycle, determined that "the duty cycle rule ... can be relaxed" and it eliminated the duty cycle rule entire for (i) fixed and mobile transmissions where no TV Channel 13 predicted Grade B contour exists; and (ii) for fixed transmission in Metropolitan Statistical Areas ("MSAs") where the 218-219 MHz service contour overlaps the TV Channel 13 predicted Grade B contour, as long as the 218-219 MHz transmissions are outside of the Grade B contour.<sup>43</sup> However, vast portions of the MSAs, as well as some Rural Service Areas ("RSAs"), are still subject to the restraints imposed by the 5-second duty cycle which hampers both technology and service development by creating inconsistent operating guidelines for 218-219 MHz service from area to area.

The Commission itself acknowledges that other services are authorized to transmit in frequencies adjacent to or nearby 218-219 MHz without duty cycle restrictions, and notes that it has not received any interference complaints to TV Channel 13 from any of these operations. The Commission has recently proposed to make the AMTS service commercially available nationwide, and the 220-222 MHz licensees currently provide commercial dispatch

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<sup>42</sup> 47 C.F.R. § 95.863(a).

<sup>43</sup> Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Service to Subscribers, *Report and Order*, 11 FCC Rcd 6610 (1996).

service. In order to ensure regulatory parity, the Commission must remove the regulatory restrictions which have unfairly burdened the 218-219 MHz band, while not impacting neighboring spectrum licensees which offer similar wireless services. Further, the duty cycle limitation was never designed to be the primary interference prevention mechanism, but rather only as a "back-up" or redundant broadcast signal safeguard.<sup>44</sup> Removal of the rule would be consistent with the Commission's efforts to streamline its rules pursuant to Section 161 of the Communications Act of 1934, as amended ("Act").<sup>45</sup> Accordingly, the 218-219 MHz licensees propose that the duty cycle restriction be eliminated in order to allow 218-219 MHz licensees to operate on the same regulatory terms as other neighboring spectrum owners.

## VIII. Conclusion

Recognizing the importance of the Commission promoting its goals of regulatory parity and enhancing competition among wireless services, the 218-219 MHz Licensees support the proposals to allow both common and private carrier services by 218-219 MHz service licensees. The 218-219 MHz Licensees also support the Commission's proposal to reamortize the installment payment debt but strongly believe that the amnesty option must be modified to refund the second ten percent (10%) downpayment made by 218-219 MHz service licensees and that interest-only payments should be allowed for the first five years of the license term.

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<sup>44</sup> In reaching its conclusion to scale back but not repeal the duty cycle, the Commission offered that: "(t)he duty cycle rule, however, was not one of the principal ways we intended to minimize the potential for interference. Rather it serves as an additional safeguard." Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide Interactive Video and Data Services, Report and Order, 7 FCC Rcd. 1630, 1635 (1992).

<sup>45</sup> 47 U.S.C. § 161.

Finally, the 218-219 MHz Licensees believe that the Commission should amend its technical rules by eliminating the automatic power control capability restrictions, the antenna height and transmitter power limitations and the duty cycle limitations, thereby providing more flexibility for licensees. Removing these impediments from the development and operation of 218-219 MHz systems is consistent with the Commission's goal of streamlining its rules pursuant to Section 161 of the Act.

If the Commission amends Part 95 of its rules in a manner consistent with proposals herein contained, it can ensure regulatory parity and promote competition among wireless services, while providing the flexibility needed to establish the 218-219 MHz industry to better serve the public.

Respectfully submitted,

**218-219 MHz LICENSEES**

By: 

J. Jeffrey Craven

Janet Fitzpatrick

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Washington, D.C. 20037-1350

202-457-6000

Its Attorneys

October 30, 1998

EXHIBIT A

**ENGINEERING STATEMENT  
TO ACCOMPANY REQUEST TO OPERATE  
INTERACTIVE VIDEO AND DATA SERVICE  
WITH 250 WATTS ERP AND AN HAAT OF 212.3 METERS  
ON BEHALF OF  
DISPATCH INTERACTIVE VIDEO AND DATA SERVICE**

**JUNE 1998**

**COHEN, DIPPELL AND EVERIST, P.C.  
CONSULTING ENGINEERS  
RADIO AND TELEVISION  
WASHINGTON, D.C.**

City of Washington )  
 ) ss  
District of Columbia )


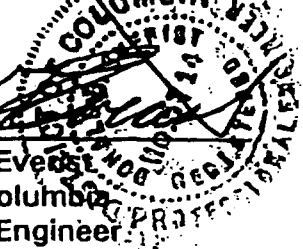
Donald G. Everist, being duly sworn upon his oath, deposes and states that:

He is a graduate electrical engineer, a Registered Professional Engineer in the District of Columbia, and is President of Cohen, Dippell and Everist, P.C., Consulting Engineers, Radio - Television, with offices at 1300 L Street, N.W., Suite 1100, Washington, D.C. 20005;

That his qualifications are a matter of record in the Federal Communications Commission;

That the attached engineering report was prepared by him or under his supervision and direction and

That the facts stated herein are true of his own knowledge, except such facts as are stated to be on information and belief, and as to such facts he believes them to be true.

  
Donald G. Everist  
District of Columbia  
Professional Engineer  
Registration No. 5714  


Subscribed and sworn to before me this 18th day of June, 1998.

  
Notary Public

My Commission Expires: 2/28/2003

**COHEN, DIPPELL AND EVERIST, P. C.****ENGINEERING STATEMENT  
DISPATCH INTERACTIVE TELEVISION, INC.****PAGE 1**

This engineering statement has been prepared on behalf of Dispatch Interactive Television, Inc. ("DITV"), a wholly-owned subsidiary of the Dispatch Printing Company ("Dispatch"), and the licensee of IVDS (Station KIVD0037) for the frequency band of 218.501 MHz to 219.0 MHz in Indianapolis, Indiana. A Dispatch subsidiary also is the licensee of Television Station WTHR(TV), Indianapolis, Indiana. WTHR(TV) operates on television Channel 13 (210-216 MHz) which is immediately adjacent to the IVDS frequency band authorized to Dispatch. This statement is being submitted in support of DITV's proposal to collocate on the same tower the proposed operation with the WTHR(TV) Channel 13 facility with an effective radiated power ("ERP") up to 250 watts.<sup>1\*</sup>

The Federal Communications Commission in Docket No. 20735 adopted standards for collocated TV and FM operations. These standards were the basis of Section 73.535 of the FCC Rules.

These standard permit that an educational FM station located within a quarter of a mile of the Channel 6 TV station transmitter site to be considered

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<sup>1</sup>Dispatch is authorized to operate of Segment "B" in Indianapolis, Indiana. The presently authorized site is 16.4 km from the WTHR(TV). As indicated in the report entitled, "New IVDS Station "B" Segment Indianapolis, Indiana dated August 10, 1994 some interference originally was expected to occur near the tower supporting the IVDS CTS antenna.

**COHEN, DIPPELL AND EVERIST, P. C.****ENGINEERING STATEMENT  
DISPATCH INTERACTIVE TELEVISION, INC.****PAGE 2**

as a collocated operation. A number of factors impact on the ability of a collocated station to protect the service area of another facility.

- (1) Differences in the vertical and horizontal radiation patterns of the proposed and of the TV antenna systems
- (2) Differences in height between the proposed operation and the TV antenna radiation centers
- (3) The large relative variations in received signals at large depression angles from each antenna
- (4) The non-circularity of the proposed operation's pattern, due to the tower distortion of the proposed operations horizontal and vertical radiation patterns.

The FCC recognizes that the differences in the radiation patterns of the TV, when it assumed maximum radiation from each antenna for all distances from the transmitter site. At the steeper depression angles from each of the transmitting antennas for distances of approximately 10 miles or less depending on radiation center height, the maximum radiation may not be applicable. Actual radiation towards a specific TV reception point is a function of antenna height and the relative number of bays of proposed operation and TV antenna.

Proper choice of the proposed antenna, effective radiated power, and antenna height, can make the proposed operation compatible with the TV and avoid or minimize destructive interference to Channel 13 reception.

**COHEN, DIPPELL AND EVERIST, P. C.****ENGINEERING STATEMENT  
DISPATCH INTERACTIVE TELEVISION, INC.****PAGE 3**

Dispatch proposes to collocate the proposed IVDS facility on the WTHR(TV), Channel 13 transmission tower providing an optimum method of protecting the signal from the WTHR(TV) transmitting antenna. Under this proposal, the vertical polarized signal strength from the proposed IVDS relative to the WTHR(TV) signal will be maintained throughout the WTHR(TV) service area in order to ensure a Channel 13 interference-free operation. By virtue of the difference in power level, a signal ratio between the IVDS transmission and the WTHR(TV) horizontal and vertical signal will be -31.0 dB or greater<sup>2</sup>.

The IVDS antenna will be side-mounted on the existing WTHR(TV) tower. The existing tower has a total overall structure height above ground of 316.8 meters (1039.5 feet). The existing transmitter site is located at Ditch Road and 96th Street, Hamilton County, Indiana. Since there is no change in overall height FAA airspace approval is not required. Exhibit E-1 is provided which depicts the relevant data of the existing tower and the location of the proposed IVDS antenna. The tower registration number is 1024109.

Exhibit E-2 provides the predicted 39 dBu F(50,50) and 39 dBu F(50,90) contours. These contours have been predicted using the eight cardinal radials and

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<sup>2</sup>Furthermore, in the horizontal plane the TV signal will receive an additional minimum of 10 dB protection.

**COHEN, DIPPELL AND EVERIST, P. C.****ENGINEERING STATEMENT  
DISPATCH INTERACTIVE TELEVISION, INC.****PAGE 4**

the propagation curves outlined in Section 73.625, 73.683, and 73.684 of the FCC Rules.

The geographic coordinates of the site were determined by survey and are the basis of the WTHR(TV) NTSC Channel 13 licensed as follows.

North Latitude: 39° 55' 43"

West Longitude: 86° 10' 55"

**Power Data**

Effective Radiated Power, Maximum	250 watts   -6.02 dBk
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**Elevation Data**

(Existing Tower; No Change in Overall Height)

Overall height above ground of the existing antenna structure (including beacon)	316.8 meters 1039.5 feet
Center of radiation of IVDS antenna above ground	213.36 meters 1524 feet
Elevation of site above mean sea level	251.2 meters 824.0 feet
Center of radiation of IVDS antenna above mean sea level	464.6 meters 1524 feet
Overall height above mean sea level of existing tower (including beacon)	568.0 meters 1863.5 feet
Antenna height above average terrain	212.2 meters

Note: Slight height differences result due to conversion to metric.

**COHEN, DIPPELL AND EVERIST, P. C.****ENGINEERING STATEMENT  
DISPATCH INTERACTIVE TELEVISION, INC.****PAGE 5****Other Licensed and Broadcast Facilities**

No adverse technical effect is anticipated by the proposed IVDS operation to any other FCC licensed facility. If required, the applicant will install filters or take other measures as necessary to resolve the problem.

**FCC Rule, Section 1.1307**

The proposed 250 watt operation will utilize an Andrew SPECIAL or the equivalent antenna with a center of radiation above ground of 213.36 meters. The proposed antenna will be side-mounted on an existing single guyed, uniform, cross-section, steel lattice tower with an existing overall height of 568 meters AGL.

There are no AM stations located within one km of the existing WTHR(TV) tower site. According to the FCC data base, there are no FM or other full-service TV stations located within 100 meters. An LPTV station, WALV-LP, licensed to Indianapolis, Indiana, also transmits from the WTHR(TV) tower.

The property on which the WTHR(TV) tower is located is at Ditch and 96th Street, Hamilton County, Indiana. Access to the tower property is prevented by a six foot chain link fence with a locked gate. In addition, to prevent unauthorized access to the tower, a fence with three strands of barb wire with a locked gate encloses the tower base.

The proposed operation based upon the current OET Bulletin No. 65, Edition 97-01 dated August 1997 and Supplement A meets the provisions of the FCC radio

**COHEN, DIPPELL AND EVERIST, P. C.****ENGINEERING STATEMENT  
DISPATCH INTERACTIVE TELEVISION, INC.****PAGE 6**

frequency field ("RFF") guidelines, and thus, complies with Section 1.1307 of the FCC Rules. Provisions will be made to reduce power or to terminate the transmitter emissions, as appropriate, when it is necessary for authorized personnel to be on the tower.

For NTSC, WTHR(TV) employs an RCA, Type TCL-16A13 circularly polarized antenna. The antenna manufacturer representative indicates that the elevation pattern for this antenna shows a maximum relative field of less than 0.1 towards the ground in the vicinity of the tower. Using this relative field factor and the procedures prescribed in OST Bulletin No. 65, the maximum RFF resulting from the present operation at two meters above the base of the tower is calculated to be less than 2 microwatts/cm<sup>2</sup>. This is less than 1% of the 200 microwatts/cm<sup>2</sup> maximum human exposure to RFF recommended by the current FCC guidelines.

WALV-LP is licensed to operate with an effective radiated power of 13.8 kW (circular) on UHF Channel 27 with a center of radiation above ground of 253.4 meters (831.3 feet). Its contribution at 2 meters above ground level using the above methodology is less than 0.5  $\mu\text{W}/\text{cm}^2$ . The RFF guideline for Channel 27 is 1827  $\mu\text{W}/\text{cm}^2$ .

WTHR(TV) proposes a DTV operation. WTHR(TV) proposes to use a Dielectric TFU-18DSC-R 04 or equivalent antenna. As shown the elevation pattern for this antenna shows a maximum relative field of less than 0.1 towards the ground in the

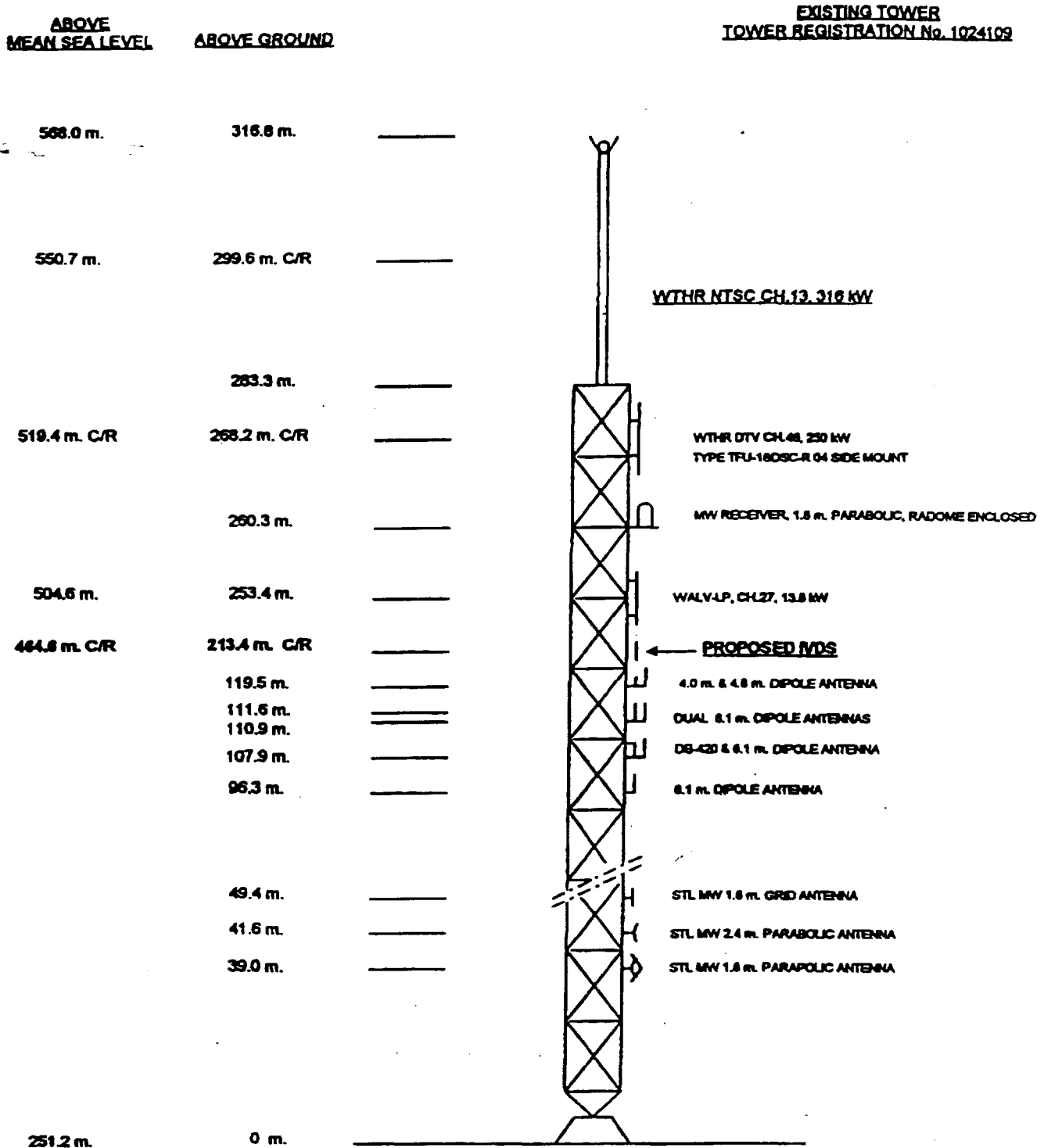
**COHEN, DIPPELL AND EVERIST, P. C.****ENGINEERING STATEMENT  
DISPATCH INTERACTIVE TELEVISION, INC.****PAGE 7**

vicinity of the tower. Using this relative field factor and the procedures prescribed in OST Bulletin 65, the maximum RFF resulting from the proposed operation is less than 1 mw/cm<sup>2</sup>. This is less than one (1) percent of the 2207 mw/cm<sup>2</sup> maximum human exposure to RFF recommended by the current FCC guidelines.

The proposed operation by the 250 watt IVDS operation will contribute less than 1 (one) percent to the RFF level at 2 meters above ground.

The total contribution by both existing stations, the proposed DTV operation, and the proposed IVDS operation at 2 meters above ground level is less than four (4) percent of the current FCC guidelines.

Authorized personnel and rigging contractors will be alerted to the potential zone of high radiation on the tower, and if necessary, the station will operate with reduced power or terminate the operation of the transmitter as appropriate when it is necessary for authorized personnel or contractors to perform work on the tower. Workers and the general public, therefore, will not be subjected to RFF levels in excess of the current FCC guidelines.



**EXHIBIT E - 1**  
**VERTICAL SKETCH**  
**WTHR-TV, INDIANAPOLIS, IN**  
**PROPOSED IVDS OPERATION**  
**JUNE 1998**

**NOT TO SCALE**

COHEN, DIPPELL and EVERIST, P.C. Consulting Engineers

09/09/98 WED 16:01 [TX/RX NO 6060]

